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No. 10-1292

IN THE

Supreme Court of the United States

DANIEL CHAPTER ONE, ET AL.,
Petitioners,
v.
FEDERAL TRADE COMMISSION,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF U.S. JUSTICE FOUNDATION AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The two *amici curiae* are legal defense organizations exempt from federal income taxation under IRC section 501(c)(3).

United States Justice Foundation ("USJF") (http://usjf.net/) was incorporated in California in 1979, and operates as a public interest law firm with interest in a wide range of issues. Since its founding, USJF has been involved in the protection of the First Amendment rights of individuals and entities, and, in that vein, has participated in many cases of note, including this one.

Conservative Legal Defense and Education Fund, ("CLDEF") (http://www.cldef.org) was incorporated in the District of Columbia in 1982, and operates as a legal defense organization dedicated to the correct construction, interpretation, and application of the law, and proper application of Biblical principles.

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[1] It is hereby certified that the parties have consented to the filing of this brief; that counsel of record for all parties received notice at least 10 days prior to the due date of the intention to file this *amicus curiae* brief; and that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The law firm of William J. Olson, P.C., attorneys for these *amici*, previously represented Petitioners, *inter alia*, in the U.S. Court of Appeals for the District of Columbia Circuit below, and in the U.S. District Court for the District of Columbia. Final substitution of counsel occurred on January 2, 2011.

STATEMENT OF THE CASE

Daniel Chapter One ("DCO") is a Christian house church which operates a healthcare ministry based on the spiritual gifts, education, training, and experience of its founders, James and Patricia Feijo. Structured as a nonprofit religious corporation sole under the laws of the State of Washington, and headquartered in Portsmouth, Rhode Island, DCO has presented the Gospel of Jesus Christ, taught Biblical principles of healthcare and healing from the Word of God, and offered a number of herbal and nutritional products for sale to the public for many years. DCO uses the Internet, publications, speaking engagements around the country, and a daily radio show to share the Good News of Jesus Christ and the healing qualities of DCO products. *See* Brief of Petitioners, Daniel Chapter One v. FTC, No. 10-1064 (D.C. Cir., Aug. 18, 2010) (hereinafter "Pet. Brief below"), pp. 7-12.

The products offered by DCO have included conventional herbal remedies, as well as a number of products that it developed according to Scriptural principles, and its study of the combined legacy of 6,000 years of the use of herbs and nutrition, as well as its observation of many persons who had personal experience in using those products. DCO's products have been remarkably effective in promoting the health of Christians and non-Christians alike across the country. These products help the body rid itself of toxins and pathogens, and provide it with the nutritional components which the body requires to fight off disease. All of these products help the body strengthen its immune system to do what it was

designed to do by God — to heal itself.[2] http://www.danielchapterone.com.

In the fall of 2008, however, DCO came under attack by the federal government for offering to the public these Scripturally-based and historically-proven dietary supplements as an alternative to "conventional" medicine — such as chemotherapy and radiation oncology. *See* Pet. Brief below, p. 15. This attack was launched by the Federal Trade Commission ("FTC"), in conjunction with the Food and Drug Administration ("FDA"), with the effect of serving the interests of the wealthy and powerful pharmaceutical industry, and the establishment medical community, by impeding the increasing use of alternative medicine by Americans. The FTC's usurpation to set the nation's health policy to limit patient choice was called "**Operation False Cures**." http://www.ftc.gov/opa/2008/09/ boguscures.shtm. As discussed below, thus far the FTC has never even attempted to prove the DCO product claims were actually false, nor is there any such proof.

The FTC developed a theory that DCO was misleading the public solely because DCO had not tested any of its **natural dietary supplements** by controlled clinical studies of the kind conducted by the FDA before permitting the marketing of a **toxic**

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[2] One of the remarkable stories of the benefits of DCO testimony was submitted below by Declaration. See Declaration of Tedd Koren, D.C., U.S. Court of Appeals. http://www.lawandfreedom.com/site/health/DCOdeclarations/Mem_Opp_PI/Exh4_Koren.pdf

pharmaceutical drug. The FTC ignored DCO's contentions that: (a) there is **no health or safety reason** to test a nutritional supplement as one would a toxic pharmaceutical drug, and (b) most food supplements cannot be patented because it is **financially impossible** to meet the test established by the FTC. DCO made no claim that its products were backed by FDA-style tests. Rather DCO promoted its products primarily on the basis of testimonies of persons who had benefitted from using those products in their fight against cancer. In fact, the FTC was **unable to find even one person to testify** that he had been led to think that DCO's product claims were based on FDA-style clinical studies. And, despite the devotion of enormous government resources in the effort to silence DCO's educational efforts about its products, the FTC was **unable to find even one person who was harmed** by them. *See* Pet. Brief below, pp. 16, 28-29.

On the other hand, DCO brought many lay witnesses to testify under oath as to the safety and efficacy of DCO products. The **FTC's Chief Administrative Law Judge ("ALJ")** upheld the position of the FTC Complaint Counsel, and shut his ears to these lay witnesses — keeping them from testifying about their personal experiences of healing with DCO products.

The ALJ did allow DCO to present four expert witnesses, including a renowned herbalist and a naturopath, to testify, but immediately discounted all of their testimony for the sole reason that they were not medical doctors. Instead, the FTC relied

exclusively on the testimony of **one medical doctor** who no longer practices medicine, but works as a professional expert witness and designs drug studies for the same pharmaceutical industry being criticized by DCO. This same so-called expert witness could not even answer the ALJ's question as to whether an herb was a plant. *See* Pet. Brief below, pp. 29-30.

In its Petition for Review, DCO waged a vigorous challenge to the FTC's claim that it had the authority: (i) to require DCO to conform its dietary supplement ads to the FDA's "scientific" standards governing pharmaceutical drugs, and (ii) to impose its view of "scientific truth" upon DCO. DCO's petition, however, was summarily denied, without published opinion.

SUMMARY OF ARGUMENT

The FTC applied an erroneous legal standard, exercising jurisdiction over a religious ministry on the sole ground of the mere receipt of income, rather than upon the statutory requirement that such income be in excess of that which is required to carry out the ministry's nonprofit activities. Such a fundamental error intruding upon a nonprofit religious organization should not go uncorrected.

The FTC also applied an erroneous standard claiming that the ministry's marketing of dietary supplements was deceptive on the sole ground that the health claims made on their behalf did not meet FDA's standard of "controlled clinical studies" required of toxic pharmaceuticals, not because the claims were, in fact, false, as required by the FTC Act. Such a

fundamental error of statutory interpretation should be reversed.

Lastly, the FTC has done what no government has authority to do — to make the health care choices for competent individuals, over their objection. And, in ordering DCO to convey the FTC's healthcare views, DCO's First Amendment right to "speaker autonomy" and the protections afforded it by the Religious Freedom Restoration Act were ignored, constituting fundamental errors overlooked by the court of appeals, and warranting this court's review.

ARGUMENT

I. THE FTC CLAIM OF JURISDICTION OVER CHURCHES AND NONPROFIT RELIGIOUS AND MINISTRIES IS AN IMPORTANT ISSUE OF FEDERAL LAW MERITING REVIEW BY THIS COURT.

A. The Court of Appeals Erroneously Allowed the FTC to Assert Jurisdiction over Daniel Chapter One.

The Petitioners assert that the "decision below is the first time in which the court of appeals has held that a church or religious ministry is within the jurisdiction of the FTC..." and that the "D.C. Circuit's holding expands the jurisdiction of the FTC Act beyond what is allowed under the statute and the First Amendment's protection of the free exercise of religion." Pet., pp. 8, 10. These *amici* believe these representations are completely correct, and that the

Petition establishes that the court of appeals "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power...." Supreme Court Rule 10(a).

The FTC "has only such jurisdiction as Congress conferred upon it." Community Blood Bank v. FTC, 405 F.2d 1011, 1015 (8th Cir. 1969). "[I]f the jurisdiction of the Commission is challenged, it bears the burden of establishing its jurisdiction." *Id.*

The current assertion of FTC jurisdiction did not go unchallenged by DCO. Both at the hearing before the FTC, and on appeal, DCO challenged the jurisdiction of the FTC on the ground that DCO is **not** a corporation that is "organized to carry on business **for its own profit or that of its members**" — within the meaning of 15 U.S.C. section 44 (emphasis added). The FTC erred, *inter alia*, by applying an erroneous legal standard to the question of jurisdiction, having misapplied the rule of Community Blood Bank. Yet the court of appeals, without taking the care to issue a published opinion, decided this important issue affirming the FTC's usurpation of authority.

1. The FTC Applied an Erroneous Legal Standard.

The FTC found that DCO had been "organized" as a nonprofit corporation sole since 2002, having been so incorporated under the laws of Washington state. ALJ

Dec., Findings of Fact ("FoF") 28; A-174[3]; Comm. Op., p. 4, A-302. According to Washington state law, a corporation sole, by definition, is a church or religious society organized by a single overseer with the duty of holding all corporate property in "trust for the use, purpose, benefit, and behoof of his religious denomination, society or church." *See* RCW §§ 24-12.010 -24.12.030. Many church organizations are organized as a corporation sole, particularly Roman Catholic Dioceses under the authority of a local bishop. J. O'Hara, "The Modern Corporation Sole," 93 *Dickinson L. Rev.* 23, 33, 35 (1988). Article 3 of DCO's Articles of Incorporation dedicates DCO "to do whatever will promote the Kingdom of God," including "educating people in the fundamentals of liberty." ALJ Dec., FoF 29; A-175.

Yet, in an effort to circumvent DCO's express Christian purpose,[4] as well as the statutory constraints of Washington state law, the FTC erroneously asserted that "DCO bears **none** of the substantive indicia of a corporation that is truly organized **only for charitable purposes.**" ALJ Dec., p. 71, A-237; Comm. Op., p. 8, A-306 (emphasis added). Under the FTC Act, it is the FTC's burden to establish that DCO has been "organized to carry on business for its own profit," not DCO's burden to prove otherwise.

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[3] References to "A" are to the Appendix filed with the briefs in the court of appeals.

[4] *See* Matthew 6:33; Mark 1:14; Luke 4:4, John 3:3, and Acts 1:3.

2. The FTC Erroneously Assumed that DCO's Receipt of Income Established FTC Jurisdiction.

Purporting to apply the rule in Community Blood Bank, the FTC erroneously ruled that DCO was subject to FTC jurisdiction because "by engaging in commercial activities, DCO operates a commercial enterprise," not a religious or charitable ministry. *See* Comm. Op., p. 7, A-305. No such dichotomy exists. Under Washington law, a corporation sole is authorized to "transact[] business" without negating or violating the corporation's charitable purpose. *See* In re Catholic Bishop of Spokane, 329 Bankr. Rep. 304, 327-28 (E.D. Wash. 2005). Indeed, the history and modern use of the corporation sole form strongly establish their essential "ecclesiastical" nature and purpose, while at the same time engaging in supportive commercial activities. *See* O'Hara, "The Modern Corporation Sole," at 33, 35 (1988).

The FTC incorrectly presumed otherwise — that DCO was a corporation organized **for profit** simply because DCO was engaged in money-generating sales of its products. *See* Comm. Op., pp. 4-8, A-304-07. That was the same error that the FTC made in Community Blood Bank, wherein the FTC claimed jurisdiction over a "corporation engaged in business only for charitable purposes [if it] receives income in excess of expenses." *See id.*, 405 F.2d at 1016. However, Community Blood Bank expressly rejected that argument, ruling that "even though a corporation's income exceeds its disbursements its nonprofit character is not necessarily destroyed." *Id.*,

405 F.2d at 1017. Instead, the court adopted the rule that an entity's nonprofit character is lost **only if it can be shown that** either the entity or its members "derived a profit **over and above** the ability to **perpetuate or maintain** [its] existence." *Id.*, 405 F.2d at 1019 (emphasis added). DCO "'does not cease to be a nonprofit corporation merely because it has income.'" *See id.*, 405 F.2d at 1020.

II. THE FTC MISUSE OF ITS STATUTORY AUTHORITY IS AN IMPORTANT ISSUE OF FEDERAL LAW MERITING REVIEW BY THIS COURT.

Sections 5(a) and 12 of the FTC Act (15 U.S.C. §§ 45(a) and 52), respectively, make unlawful "deceptive acts or practices" and "false" advertisements "in or affecting commerce." The FTC believes that it may enforce these prohibitions under either its (i) "'falsity' theory" or (ii) "'reasonable-basis' theory." *See* ALJ Dec., p. 99, A-265. Tracking the statutory language, the falsity theory appropriately requires "the government [to] carry the burden of proving that the express or implied message conveyed by the ad is false." *Id.*, n.4, A-265. Under its "reasonable basis" construct, however, the FTC circumvents the FTC Act's requirement that it prove deception or falsity, as the FTC claims that it need only establish that an ad's "**net overall impression**" "carr[ied] ... the express or implied representation that the advertiser had a **reasonable basis** substantiating the claims at the time the claims were made." *Id.* at 99, A-266 (emphasis added). Once this foundation has been established, then the burden shifts to the advertiser to

produce the "substantiation they relied on for their product claim," after which the FTC has "the burden of establishing that [the] purported substantiation is inadequate." *Id.* at 100, A-266.

Moreover, in this case, the FTC has manipulated its reasonable basis theory to require DCO not just to substantiate that its implied product claims are "reasonable," but also that its implied claims are supported by "competent and reliable scientific evidence," that is , by the FDA standard of "controlled clinical studies." *See* ALJ Dec., pp. 103-04, A-269-70. The FTC has imposed this burden on DCO without first establishing the factual predicate required by its "reasonable basis" theory, namely, that the "overall net impression" of DCO's ads carried the express or implied representation that DCO's product claims were based on such "controlled clinical studies." Because the FTC has bypassed this step, it has misused its own "reasonable basis" theory to further a public health policy unauthorized by the FTC Act, and thereby, has exercised a power **not** conferred by Congress as unambiguously stated in sections 5(a) and 12 of the FTC Act, and as reinforced by the Dietary Supplement Health and Education Act of 1994.

Because the language of sections 5(a) and 12 unquestionably limit the FTC's authority to protecting the consumer from "fraud, deception, and unfair business practices in the marketplace,"[5] the standard of review governing the FTC's authority in this case is

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[5] Federal Trade Commission, "Protecting America's Consumers" http://www.ftc.gov.bcp/index.shtml.

not governed by the principle of deference to a reasonable administrative interpretation of the empowering statute, but by *de novo* review in the Court of Appeals, as well as by this Court. *See* General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581, 600 (2004).

A. Requiring DCO to Substantiate Its Product Claims by "Controlled Clinical Studies" Is outside FTC's Statutory Authority.

The FTC never claimed that DCO actually made any false representation respecting any of the Four Challenged Products. *See* ALJ Dec., p. 99, A-265; Comm. Op., p. 12, A-310. Rather, the FTC alleged that DCO's statements about the Four Challenged Products created the **overall net impression** that (i) each product was effective in the treatment of cancer or inhibited or eliminated tumor growth, and (ii) that DCO implied that it possessed and relied upon a **reasonable basis** that substantiated that overall net impression. *See* Compl. ¶¶ 6-15, A-24-27 (emphasis added). Alleging further that DCO's claims were, in fact, unsubstantiated by any "reasonable basis," the FTC charged DCO with having engaged in "unfair or deceptive acts or practices, in or affecting commerce in violation of Sections 5(a) and 12 of the FTC Act." Compl. ¶ 17, A-27.

At the hearing, DCO presented evidence through five expert witnesses. Yet, the ALJ entirely disregarded their opinions because they did not address whether "there is **competent and reliable scientific evidence**" to support DCO's claims about

the efficacy of the Four Challenged Products. *See* ALJ Dec., FoF 388-89, 398-400; A-227-29 (emphasis added). However, the FTC Complaint did not charge DCO with having implied that its claims were based upon "competent and scientific evidence"; it charged only that DCO's ads implied that it had a "reasonable basis" for its claims. Compl. ¶¶ 14-15, A-27. Nor did the ALJ require that the FTC establish that DCO's advertisements implied that its product claims rested on "competent and reliable scientific evidence," as the reasonable basis theory purports to require. Instead, the ALJ ruled that a general standard of "reasonableness" did not apply, because DCO's statements were "health-related" and, for that reason alone, they "require[d] a high level of substantiation" — which the ALJ determined to be "competent and reliable scientific evidence." *See* ALJ Dec., p. 102, A-268.

Indeed, the ALJ — not finished in raising the bar — then ruled that DCO's health-related claims must meet an even higher standard of substantiation. Because DCO's claims gave the overall net impression "that the Challenged Products prevent, treat or cure cancer, inhibit tumors, and ameliorate the adverse effects of radiation and chemotherapy," the ALJ insisted that DCO must show that its claims were supported by "**controlled clinical studies**" of the kind required by the FDA for the approval of a new pharmaceutical drug. *See* ALJ Dec., p. 103, A-269. *See also* Expert Report of Denis R. Miller, M.D. ("Miller Report"), pp. 7-12, A-76-81. Again, the ALJ did not require FTC to establish that the net overall impression of DCO's claims implied that they rested on such "controlled

clinical studies," as the "reasonable basis" theory purports to require. Instead, the ALJ justified the higher standard of "controlled clinical studies" on the ground that "the evidence shows that foregoing a proven cancer treatment in favor of an ineffective treatment would be injurious to a patient's health." ALJ Dec., p. 103, A-269.

On administrative appeal, the Commission affirmed, ruling that DCO has "not produced anything to show that they possessed and relied on any competent and reliable scientific evidence to support the overall net impressions conveyed by the advertisements at issue." Comm. Op., p. 18, A-316. The Commission agreed with the ALJ that only the FTC witness — a medical doctor and oncologist — was qualified to testify as to whether there was a "reasonable basis" for DCO's claims, and adopted, as its own, the FTC witness' definition of "competent and reliable scientific evidence." Comm. Op., pp. 18, 22, A-316, A-320. As stated in his report, the FTC expert witness explained that:

> to **constitute competent and reliable scientific evidence**, a product that purports to treat, cure, or prevent cancer must have **efficacy and safety demonstrated through controlled clinical studies**. **My understanding** of what constitutes competent and reliable scientific evidence is **consistent with the FDA's regulations** that define the criteria for adequate and well-controlled clinical investigations, which are set forth at 21 C.F.R.

> sec. 314.126. [Miller Report, pp. 7-8, A-76-77 (emphasis added).]

The criteria set forth in the cited Code of Federal Regulations section is the standard promulgated by the FDA governing approval to market a new pharmaceutical drug, a matter totally outside the authority of the FTC. Yet, Dr. Miller applied, and the FTC erroneously adopted, that FDA pharmaceutical standard to determine whether DCO had engaged in a "deceptive act or practice" under section 5(a) of the FTC Act with respect to a dietary supplement, as if the FTC, like the FDA, were empowered by statute to protect the public health and safety.

The FTC is "charged with the enforcement of no policy except the policy of the law." *See* Humphrey's Executor v. United States, 295 U.S. 602, 624 (1935). On their face, sections 5(a) and 12 of the FTC Act authorize the FTC **only** to protect consumers from deceptive or misleading advertising, **not** to protect the public health and safety — areas in which the FTC commissioners have no education or expertise.

III. THE COURT OF APPEALS' REJECTIONS OF DCO'S RELIGIOUS FREEDOM RESTORATION ACT AND FIRST AMENDMENT "SPEAKER AUTONOMY" CLAIMS CONSTITUTE FUNDAMENTAL ERRORS WARRANTING THIS COURT'S REVIEW.

A. No Government Has Authority to Dictate the Health Care Choices of Competent Individuals.

As discussed in Section I of this Argument, *supra*, the FTC has no jurisdiction over DCO because the U.S. Congress has given it no power to regulate statements made by religious ministries and churches. And, as discussed in Section II, *supra*, the FTC has no authority to require that DCO substantiate its opinions about nutritional supplements with clinical tests of the sort required for toxic drugs.

However, even more insidious is the court of appeals' affirmance of the FTC's assumption of a power that the federal government does not have over the sovereign people in this constitutional republic.

A government's basic function is established in I Peter 2:11-13: "Submit yourself ... unto governors, as unto them that are sent by him for the **punishment** of **evildoers**, and for the **praise** of them that **do well**." While the FTC, no doubt, believes that it is doing well, it is not the government that decides what is good and what is evil — but God, as revealed in Holy Scriptures.

Indeed, perverting the legitimate function of government, the FTC's actions benefit those who seek to force Americans away from using health-giving herbal and other nutritional supplements and rely exclusively upon toxic drugs marketed by powerful pharmaceutical interests. At the same time, the FTC punishes those like DCO who are doing good — warning the nation of evil in a watchman's ministry (Ezekiel 3:17), educating and exhorting the Church to an understanding of the body as God designed it, and providing a healing ministry offering products to the Church and beyond.[6]

In seeking to know the mind of God on the topic of evil in healthcare, increasing numbers of Christians find it instructive that the Greek word "pharmakeia" (Strong's G5331) — which is the root of "pharmaceutical" — is translated in the Holy Bible as "witchcraft" (Galatians 5:20) and "sorceries" (Revelation 9:21; Revelation 18:23 "for by their sorceries were all nations deceived.").

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[6] The Petition for Certiorari sets out the issues presented in terms of the right of "parishioners" to purchase DCO products. This terminology is commonly applied to today's "local churches," and "house churches" where the First Century Church met (*see, e.g.*, 1 Corinthians 4:17; 2 Corinthians 11:8; 1 Thessalonians 2:14; 2 Thessalonians 1:1. However DCO's ministry is not so limited, but rather directed to what is known as the "church universal" (*see, e.g.*, Matthew 16:18; Ephesians 1:22-23; 1 Corinthians 12:28; *see also* Nicene Creed (reference to "one holy catholic and apostolic Church")). In fact, like Jesus' healing ministry, DCO's ministry is not confined to those already believers (*e.g.*, Luke 6:6-11), but rather serves as a means to draw people to Christ, *i.e.*, to proselytize.

The human body may be matter in motion to an atheist, but to the Christian, it is the "Temple of the Holy Spirit." 1 Corinthians 6:19. The body, then, is to be treated in accord with Biblical principles. I Corinthians 6:20. While a medical doctor who rejects the Bible may view himself as the source of life for the sick, a Christian knows that God is the giver and author of life. *See* Genesis 1 and 2; Acts 3:15. The medical doctor exclusively relied on by the FTC's Administrative Law Judge is an advisor to the sick — not a decider for the sick. The FTC ignored this truth. The court of appeals did not even believe these foundational principles deserved to be addressed in a published opinion.

The FDA may believe that most medical problems can be cured with toxic pharmaceuticals, but Christians increasingly understand that, while science can replicate certain substances which cannot be produced physiologically in certain persons, there are no illnesses caused by a deficiency of a pharmaceutical drug.

There is no command in Scripture that deals with the body that identifies any role for the government, yet the FTC claims a role that God gave to each person, individually. In the first chapter of the book of Daniel, after which DCO takes its name, Daniel was willing to risk his life to obey God's dietary instructions. *See* Daniel 1:10-16. It is no coincidence that, while over 100 other organizations threatened by the FTC capitulated, that the one organization still resisting evil is a small religious ministry from the

smallest state in the nation, standing against governmental wrongdoing. *See* Ephesians 6:14.

B. Parts II and III of the FTC's Order Substantially Burden DCO's Exercise of Religion in Violation of RFRA.

The court of appeals dismissed Petitioners' Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1(a), *et seq.*, ("RFRA") claim by simply declaring that "neither evidence nor logic supports DCO's argument that religious tenets prevented sending its customers a letter with a message clearly attributed to the FTC." Per Curiam Judgment ("Judg.), p. 2. This ruling highlights the consistent failure of the FTC and the court of appeals to attribute any worth to DCO's religious beliefs, not even purporting to address, certain "exercise of religion" claims made by the Petitioners. The ruling below is an attempt to circumvent the requirements of RFRA itself. *See* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 434 (2006).

As Petitioners argued below, by requiring DCO to possess and rely upon competent and reliable scientific evidence with respect to any health claims, the Order substantially burdens DCO's "exercise of religion," which includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2, 2000cc-5. *See* Pet. Brief below, pp. 55-60.

The Christian faith, in particular, teaches the interrelation between a person's spiritual and physical

health, with an emphasis upon the Biblical principle that God is the source not only of the salvation of man's soul but the healing of man's body. *See* Isaiah 53:5 and 1 Peter 2:24. That principle lay at the heart of the DCO ministry, as reflected in its very name and its operation. Enforcement of Parts II and III of the Order would require DCO to change its allegiance from God and the Bible to "the expertise of professionals in the relevant area," as determined by the FTC. *See* Modified Final Order, Part I.A, p. 1, A-334. Instead of relying on prayer, testimony, and the application of Biblical principles, DCO would be required to "possess and rely" on "tests, analyses, research, or other evidence ... that has been ... conducted and evaluated in an objective manner by persons qualified to do so," as determined by the FTC. *Id.* Such an order would effectively destroy the integrity of the DCO ministry, even if its claims for the products covered by Parts II and III are otherwise, in fact, "true and nonmisleading." *See* Pet. Brief below, pp. 58-60. Indeed, as Petitioners argued below, the Order would require DCO to embrace the FTC's **secular belief** that conventional cancer treatments have been "**scientifically proven,**" directly contrary to DCO's deeply held religious beliefs, laying the foundation for one of Petitioners' claims under RFRA. *See* Pet. Brief below, p. 60. The court of appeals did not address these arguments, effectively ignoring the protections afforded by RFRA for those exercising their religion.

C. Part V.B of the FTC's Order Contravenes both RFRA and the First Amendment Principle of Speaker Autonomy.

According to RFRA, the Order cannot substantially burden **any** "exercise of religion," whether compelled by or central to a system of religious belief. 42 U.S.C. § 2000cc-5(7). According to the Supreme Court, exercise of religion is not limited to the positive expression of "belief and profession," but includes "abstention from physical acts." *See* Employment Division, Dept. of Human Resources v. Smith, 494 U.S. 872, 877 (1990).

By requiring DCO to sign and mail a letter containing the views of the FTC, thereby forcing DCO to identify itself with a message with which it profoundly disagrees, the Order substantially burdens DCO's exercise of religion. The court of appeals, without analysis, summarily dismissed DCO's RFRA and First Amendment claims as nothing more than deceptive commercial speech. *See* Judg., p. 2. In either event, it erred, in violation of RFRA. Aside from the fact that Petitioners were never permitted to pursue their RFRA claim below — so that the court of appeals had no record on which to discern the tenets or practices of DCO's religion — the court of appeals mischaracterized the Order, which does much more than send a message that may be attributed to the FTC.

Indeed, an entire paragraph of the Order is devoted to **counseling** in connection with **herbal products generally**, telling the recipient, first, that "it is

important to **talk to your doctor or health care** provider before using **any** herbal product in order to ensure that all aspects of your medical treatment work together." Order, Att. A, p. A-340. Next, the recipient is advised that "[s]ome **herbal products** may interfere or affect your cancer or other medical treatment, may keep your medicines from doing what they are supposed to do, or could be harmful when taken with other medicines, or in high doses." *Id.* Finally, the recipient is counseled "to talk to your doctor or health care provider before you decide to take **any herbal product** instead of taking **cancer treatments** that have been **scientifically proven to be safe and effective** in humans."[7] *Id.* Clearly, the letter mandated by the Order would require DCO to embrace and propagate the FTC's **secular belief** that conventional cancer treatments have been "**scientifically proven,**" directly contrary to DCO's deeply held religious beliefs. *See* Pet. Brief below, p. 60.

By design, the FTC Order mandates that Petitioners not only use their private property to carry the FTC's message, but purport to be the FTC messengers, at risk of substantial penalties, including a "civil" sanction of up to $16,000 for each of the many

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[7] There is strong debate over the "effectiveness" of conventional cancer cures. For example, oncologist Guy B. Faguet, M.D.'s study of "three decades of disappointing progress in cancer treatment" concludes that "disease eradication is currently achievable in only 11 of over 200 human malignancies and meaningful survival prolongation is possible for another few...." Guy B. Faguet, The War on Cancer (Springer 2008), pp. xiii-xiv.

hundreds of letters unsent -- if they fail to do so. *See* 15 U.S.C. § 45(m). The First Amendment supports the Petitioners' belief and argument below that they should not be required to speak the FTC's own words in the FTC's stead, a principle which the Supreme Court stands firmly behind. *See, e.g.*, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573 (1995); Wooley v. Maynard, 430 U.S. 705, 713 (1977).

The court of appeals never even mentioned the principle of speaker autonomy, or the Petitioners' First Amendment argument that the Order clearly violated that principle. In the context of dismissing Petitioners' RFRA claims, the court stated that the complained-of message was "clearly attributed to the FTC" (Judg., p. 3), but the only mention of the First Amendment was to declare that, even if it were to apply, the Order was "carefully tailored to protect DCO's clientele from deception." *Id.* at 2.

The court of appeals cannot be permitted to run roughshod over the rights of litigants, ignoring important pronouncements by this Court. In Wooley v. Maynard,, the petitioner filed an affidavit wherein he stated that he "refused to be coerced by the State into advertising a slogan which [he found] morally, ethically, religiously and politically abhorrent." *Id.*, 430 U.S. at 713. The Court ruled that government may not "require" persons to "use their private property ... for the State's ideological message — or suffer a penalty" for noncompliance. *Id.*, 430 U.S. at 715. In Pacific Gas and Electric Company v. California P.U.C., 475 U.S. 1 (1986), the Supreme Court ruled

that a state agency could not require a company to send a "billing envelope[] to distribute the message of another." *See id.*, 475 U.S. at 17.

Likewise, the FTC should not be allowed to force Petitioners to deliver the government's message with which they disagree: "For to compel a man to furnish contributions of money for the propagation of opinions with which he disagrees is sinful and tyrannical." Virginia Act for Establishing Religious Freedom (1785), reprinted in 5 The Founders Constitution 84 (P. Kurland & R. Lerner, eds.: Liberty Press: 1987). This principle of "speaker autonomy" — the right "to choose the content of his own message" — is a "fundamental rule of protection under the First Amendment." *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. at 573. In upholding the FTC Order, the court of appeals ignored that important principle, and its judgment should be reversed.

CONCLUSION

When DCO filed its Petition for Review with the United States Court of Appeals for the District of Columbia Circuit, it had hoped for an independent judicial review of the several claimed errors that it presented. Instead, the court of appeals summarily dismissed DCO's petition in a one-and-a-half page unpublished opinion in complete deference to the FTC — administrative agency wielding legislative, executive and judicial powers.

Our founders warned against concentrating all three powers in one government: "The accumulation of all powers ... in the same hands ... may justly be pronounced the very definition of tyranny." The Federalist No. 47 (James Madison). More than 370 years ago, the English Parliament abolished the Court of Star Chamber by an Act that restored to the people the right to have their causes "to be tried and determined in the ordinary courts of justice, and by the ordinary course of law." *See* Sources of Our Liberties, p. 149, R. Perry & J. Cooper, eds., ABA Found.: 1978). "The main effect, [then], of the abolition of the Star Chamber was to establish ... a system of justice administered by the courts instead of by the administrative agencies of the executive branch of the government. The statute thus constituted an important reaffirmation of the concept of due process of law..." *Id.* at 132. While this Court has no authority to abolish the FTC, it does have the power to grant the petition reviewing this matter and thereby affording Petitioners a reasonable measure of justice.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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